

U.S. DEPARTMENT OF TRANSPORTATION
FEDERAL RAILROAD ADMINISTRATION
WASHINGTON, D. C.

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FRA - LOCOMOTIVE ENGINEER CERTIFICATION CASE
R. S. Backus, Hearing Petitioner, DOT DKT. No. FRA 2007-27382
(FRA DKT. No. EQAL-2006-13)

Union Pacific Railroad Company, Co-Respondent

**FEDERAL RAILROAD ADMINISTRATION'S RESPONSE TO HEARING
PETITIONER'S BRIEF**

The Federal Railroad Administration ("FRA") submits the following Response to Hearing Petitioner's Brief pursuant to Order No. 6 of Administrative Hearing Officer Rosenau's Order Setting Briefing Schedule, dated May 21, 2009, as follows:

I. Standard of Review

Administrative hearings under 49 C.F.R. § 240.409 are conducted *de novo*, in order to "find the relevant facts and determine the correct application of [part 240] to those facts." 49 C.F.R. § 240.409(c). Petitioner has the burden of proving that the Union Pacific Railroad Company's ("UP") decision to deny his certification was incorrect by a preponderance of the evidence. 49 C.F.R. § 240.409(q).

II. Factual Background

Petitioner attended UP's student engineer training program. After completing two skills performance examination rides on July 14, 2005 and August 23, 2005, UP denied Petitioner's locomotive certification due to his failure of these examinations.

At issue here is the certification ride of August 23, 2005.¹ On that date, Petitioner operated the locomotive on a final skills performance check ride beginning in Bakersfield, California, traveling south and terminating in West Colton, California. Petitioner was accompanied in the locomotive by Jason Cathey, the Designated Supervisor of Locomotive Engineers, Michael Ortega, a conductor, and Gregory Wahl, an observing engineer. Petitioner knew that a Form B was to take effect on the ride.² As the locomotive approached South Marcel, California, approximately two miles north of the Form B, Petitioner called out the Form B and the cab red zone status. Petitioner's locomotive subsequently encountered an approach diverging signal at milepost 355.6, at which time Mr. Cathey began to ask Petitioner questions regarding the territory and signal placement (the approach diverging signal was apparently unusual in this location). After operating through a tunnel, the locomotive passed a diverging clear signal at milepost 356, which took the locomotive onto the second track. At this time, Mr. Cathey repeatedly quizzed Petitioner about the location of the next signal (the locomotive apparently did not often operate on this track). As the locomotive approached the Form B, Mr. Cathey continued to quiz Petitioner, Mr. Ortega, and Mr. Wahl. Petitioner subsequently operated the locomotive into the Form B without authority. In addition, the yellow flag (providing two miles advanced notice of the Form B), and the red flag (providing notice of the Form B itself), were mistakenly not displayed, and, as such, Petitioner received no flag warning of the Form B.

¹ It should be noted that this account of the August 23, 2005 certification ride is based on deposition testimony taken for this Hearing, as well as related affidavits, and that this evidence was not entirely consistent. However, the evidence was sufficiently consistent to provide a general description of the events of that ride.

² A Form B prohibits a train from entering specified limits unless authorized by the employee in charge.

III. Discussion

Petitioner's legal arguments are without support and must be dismissed as a matter of law.³ Petitioner first argues that Mr. Cathéy's questioning of Petitioner and the other crew members while the locomotive was operating in a cab red zone constitutes an intervening cause that prevented or materially impaired Petitioner's ability to comply with the railroad operating rules or practices. Pet. Br. at 1. Petitioner also contends that UP's "agents had an ulterior motive not to grant [his] certification, and conspired to deny the certification." *Id.* These arguments are without merit.

A. The "Intervening Cause" argument is not applicable to Petitioner.

Petitioner's "intervening cause" argument must be dismissed as a matter of law. Petitioner may not assert an intervening cause argument under § 240.307(i)(1) because such an argument may only be asserted by persons who have had their engineer certifications *revoked*. Here, Petitioner's certification was denied, not revoked.

Specifically, § 240.307(i)(1) provides that a railroad:

Shall not determine that the person failed to meet the qualification requirements of this part and shall not **revoke the person's certification** as provided for in paragraph (a) of this section if sufficient evidence exists to establish that an intervening cause prevented or materially impaired the locomotive engineer's ability to comply with the railroad operating rules or practice which constitutes a violation under § 240.117(e)(1) through (e)(5) of this part . . .

49 C.F.R. § 240.307(i)(1) (emphasis added). Under this section, a person is only entitled to assert an intervening cause argument when a carrier revokes their certification. In this case, it is undisputed that UP denied Petitioner's certification. *See* Pet. Br., Ex. B. Accordingly, this argument must be dismissed as a matter of law.

³ FRA notes that Petitioner does not argue that he was entitled to relief under 49 C.F.R. § 240.117(f)(3).

B. Petitioner's conspiracy allegations do not provide a basis for relief.

Petitioner's conspiracy allegations do not entitle him to relief. Petitioner contends that UP's "agents had an ulterior motive not to grant the Petitioner's certification, and conspired to deny the certification." Pet. Br. at 1. However, Petitioner fails to provide any legal theory under which this alleged conspiracy would entitle him to relief. Moreover, Petitioner does not even connect the alleged conspiracy to the actors involved in his certification ride of August 23, 2005.

In support of the alleged conspiracy, Petitioner claims the following, that: UP "attempted to terminate" Petitioner in 1999; UP superintendent Dan Shudak told Petitioner that "he would be looking for a reason to fire" him in 2001; Mr. Shudak sent two letters to Petitioner in 2002 in which he stated that Petitioner "had been permanently dismissed;" Mr. Shudak told Petitioner in 2004 that "he would do what he could to keep [him] out of class and that [Petitioner] would never become an engineer;" and Mr. Shudak had a "verbal altercation" with Petitioner's mother in which Mr. Shudak "charged her with insubordination." Pet. Br. at 3-4.

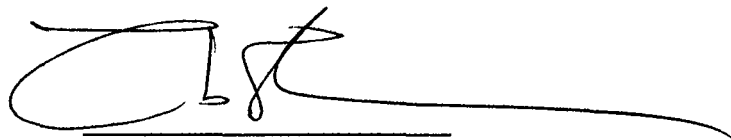
Petitioner does not discuss how these allegations support a legal theory entitling him to the requested relief. Instead, Petitioner merely asserts that there was a "conspiracy" against him. This is insufficient. Moreover, Petitioner fails to explain how the alleged actions of Mr. Shudak are in any way connected with Petitioner's certification ride of August 23, 2005. As such, Petitioner's argument must be dismissed.

IV. Conclusion

The Administrative Hearing Officer should dismiss Petitioner's legal arguments. In the event the Administrative Hearing Officer finds in favor of Petitioner, the relief requested should be limited to issuing a decision in accordance with 49 C.F.R. § 240.409(t) and (u).

Dated: July 8, 2009

Respectfully submitted,

A handwritten signature in black ink, consisting of a large, stylized 'Z' followed by a series of loops and a long horizontal stroke extending to the right.

Zeb Schorr
Federal Railroad Administration

CERTIFICATE OF SERVICE

DOT DKT. No. FRA 2007-27382

The undersigned hereby certifies that the foregoing document has been served to all parties named below via U.S. mail unless otherwise noted.

Gareth W. Rosenau
Administrative Hearing Officer
Federal Railroad Administration
1200 New Jersey Ave. SE – Mail Stop 10
3rd Floor West
Washington, DC 20590
(via *Hand-delivery*)

R.S. Backus
18184 Slover Ave.
Bloomington, CA 92316

Patricia O. Kiscoan
Legal Department
Union Pacific Railroad Company
1400 Douglas St. – Mailstop 1580
Omaha, NE 68179-1580
(via *Email*)

DOT Docket Clerk
Central Docket Management System
Docket Operations, M-30
West Building Ground Floor
(Room W12-140)
1200 New Jersey Ave. SE
Washington, DC 20590
(via *Hand-Delivery*)

Lawrence M. Mann
9205 Redwood Ave.
Bethesda, MD 20817
(via *Email*)


Zeb Schorr